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Supreme Court, U. S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

ELVA JEAN ANDERSON

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF MICHIGAN

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QUESTION PRESENTED

DID THE MICHIGAN SUPREME COURT FUNDAMENTALLY MISAPPLY THE FEDERAL LAW OF DOUBLE JEOPARDY IN HOLDING THAT THE FIFTH AMENDMENT BARRED RETRIAL ON THE ORIGINALLY CHARGED OFFENSE OF FIRST DEGREE MURDER WHERE THE RECORD SHOWS THAT THE TRIAL COURT USED THE EVIDENCE ADDUCED AT TRIAL FOR THE PURPOSE OF RECONSIDERING AND GRANTING IN MID-TRIAL DEFENDANT'S PREVIOUSLY MADE PRETRIAL MOTION TO QUASH THE MURDER CHARGES - - ON LEGAL GROUNDS, NOT TO MAKE A FACTUAL RESOLUTION OF DEFENDANT'S GUILT OR INNOCENCE - - AND WHERE DEFENDANT READILY CONSENTED TO THE TERMINATION OF HER JURY TRIAL?

Parties to the Proceeding

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Now comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward R. Wilson, Principal Attorney, Appeals, and Anne B. Wetherholt, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above-entitled cause on August 28, 1980.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is appended as Appendix "A". The opinion of the Michigan Supreme Court is reported at 409 Mich 474; _____ NW2d _____ (1980), and is appended as Appendix "B".

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on August 9, 1977. The judgment of the Michigan Supreme Court, reversing the Michigan Court of Appeals, was entered on August 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

Defendant Elva Jean Anderson was charged with first degree premeditated murder.

The court denied defendant's pretrial motion to quash on August 11, 1975, issuing a written opinion[1] that there was sufficient evidence shown at the preliminary examination to bind defendant over for trial on the charge of first degree premeditated murder. The trial began on October 7, 1975 and continued on October 8th. On the morning of October 9, 1975 the court heard and granted defendant's motion for personal bond stating, "The Court feels that if it had had all the information it has now at the beginning of this case, the defendant would never have been remanded." (Bond T. 3-4)[2] Thereupon, defense counsel stated defendant wished to offer a plea to manslaughter (Bond T. 4). An off-the-record conversation followed (Bond T. 4). The court proceeded to take defendant's plea to manslaughter over the prosecution's objection that it had not made any plea offer in this case (Plea T. 3)[3]. After the court accepted defendant's plea of guilty to manslaughter, it dismissed the crime charged in the information of first degree, premeditated murder as well as the necessarily lesser-included offense of second degree murder. (Plea T. 15-16, 23-27, 30).

The court stated that what it was doing was reconsidering and granting defendant's previously made motion to quash (Plea T. 16, 24, 26-27, 30). The prosecution informed the defendant and the court it intended to appeal the trial court's ruling and retry defendant on the original charge (Plea T. 28-29).

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1 Appendix "C"
2 Appendix "D"
3 Appendix "E"

The prosecution appealed to the Michigan Court of Appeals because under Michigan law a motion to quash the information may be granted and a plea to a lesser-included offense taken only where the magistrate abused his discretion in binding a defendant over for trial. See Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115; 215 NW2d 145 (1974).

The Michigan Court of Appeals (Appendix "A") held that the trial judge in the instant case acted improperly in accepting defendant's plea to manslaughter and that she could be retried for first degree murder. The Michigan Supreme Court (Appendix "B") agreed that the trial judge's actions appeared to be violative of Michigan law, but held that the Fifth Amendment double jeopardy clause barred retrial on the charge of first degree murder.

REASONS FOR GRANTING THE WRIT

Petitioner believes that the Michigan Supreme Court, understandably confused by the multitude of recent contradictory and conflicting double jeopardy cases decided by this Court, fundamentally misapplied the law of double jeopardy in ruling that the trial court's dismissal of murder charges by granting in mid-trial - even before the prosecution rested its case - defendant's pretrial motion to quash based on testimony he heard at trial was an "acquittal" barring retrial, despite the fact that a) it was not so denominated by the trial judge, b) it may have been erroneous both procedurally and in terms of questions of law on which it was founded, and c) it came about with defendant's cooperation and consent. Because the facts of this case present a complex situation invoking the tests previously held by this Court to be despositive of double jeopardy issues, Petitioner believes this case offers this Court a unique

opportunity to resolve the dilemma presently faced by lower courts in trying to apply the conflicting rules that currently make up the state of the law of double jeopardy.

Prior to trial in the instant case defendant had made a motion to quash the murder charges on the grounds that the examining magistrate had abused his discretion in finding the elements of the crime of first degree murder were shown from the testimony presented to him. The trial court correctly denied this pretrial motion on August 11, 1975; sufficient evidence of first degree murder had been presented to the magistrate. Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115 (1974); People v Karcher, 322 Mich 158 (1948); People v Dellabonda, 265 Mich 486 (1933).

Several days into the trial (jeopardy having attached) with more prosecution witnesses yet to testify, the trial court abruptly announced he was reconsidering and granting defendant's pretrial motion to quash the murder charges. The trial judge repeatedly stated that what he was doing was granting defendant's pretrial motion to quash the information after having heard more testimony that was presented to the magistrate at the preliminary examination:

> The People have not concurred in the acceptance of a plea to manslaughter in this case and dismissal of the charges of murder in the first degree and murder in the second degree.
>
> Under some circumstances, it has been held - in the case of the Prosecutor versus Genesee County Judge - that a trial judge - that a judge in a case may not accept a plea of guilty to a reduced charge in any case without the concurrence of the Prosecutor's Office. There are some exceptions to that rule.

It has been indicated to the Judges by Supreme Court judges, informally, that if there is an abuse of discretion on the part of the Prosecutor's Office that a Judge may exercise discretion in accepting a plea. This Court does not apply that rule to this case except to the following extent:

The Court would find in this case, after hearing the testimony up to this time, that the charge of murder should not have been made in this case; that the judge who conducted the examination in this case, if she had heard the testimony that has been given in this court, would not have bound the defendant over on the charge of murder in the first degree and that this court, prior to the trial of the case, when considering a motion made by the defense to dismiss the case, would have dismissed the charges of murder in the first degree and murder in the second degree if the court had been in possession of the facts which this court had heard in this case. (Plea T. 15-16).

* * *

. . . this court grants Mr. Roth's motion filed prior to the trial of this case, to dismiss to the extent that it applies to the charges of murder in the first degree and murder in the second degree . . . (Plea T. 23-24). (Emphasis added)

* * *

THE COURT: The Court is not granting a mistrial in the case. The Court would have felt in this case, in the interests of justice, at some stage of the proceedings that it was necessary to direct a verdict of not guilty as to the charges of murder in the first and second degrees; however, in view of the plea that was offered in the case, the court is merely granting a previous motion made by the defense to dismiss the charges and which the court feels now it should have done previously or at the time it was first heard. (Plea T. 24) (Emphasis added)

* * *

THE COURT: Yes - I am going to answer part of what you said - the Court concluded that the People simply had not overcome their burden of proving that there was no excuse or provocation as to murder in the first and second degree and, accordingly, the Court would have had to eventually direct a verdict of not guilty on those two counts.

MR. MOURADIAN: That's without hearing all the evidence in the case.

THE COURT: I granted the motion made prior to the commencement of the trial in this case. (Plea T. 26-27) (Emphasis added).

* * *

. . . I may say that, having heard the testimony in the case of the res gestae witnesses thus far, the court is satisfied that the court was in error in denying the motion previously. I am satisfied that if the Examining Magistrate had heard the testimony that has been heard in this court that the defendant would not have been bound over for trial on the charge of first degree murder in this case. (Plea T. 30) (Emphasis added)

Defendant seized the opportunity to terminate her trial by pleading guilty to the remaining lesser-included charge of manslaughter before the trial court formally dismissed the murder charges. (Plea T. 4-6).

There is no question that testimony that was adduced at trial triggered the court's decision to dismiss the murder charges. Dismissal was improper under Genesee Prosecutor v Genesee Circuit Judge, People v Karcher and People v Dellabonda, supra. However, petitioner believes that the mere fact that the trial

judge used trial testimony to dismiss charges does not resolve the issue of whether retrial is barred. One must look to what purpose he put the trial testimony; resolution of this double jeopardy issue depends on the nature of the court's action of dismissal. To determine what the court did, one must look to both the form and substance of his act.

> [A]n appeal is not barred simply because a ruling in favor of a defendant "is based upon facts outside the face of the indictment," id., at 348, 43 LEd 2d 232, 95 S Ct 1013, or because it "is granted on the ground . . . that the defendant simply cannot be convicted of the offense charged," Lee, supra, at 30, 53 LEd 2d 80, 97 S Ct 2141. Rather, a defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." United States v Scott, 437 US 82; 98 SCt 2187; 57 LEd 2d 65, 78 (1978) quoting United States v Martin Linen Supply Co., 430 US 564, SCt 1349; 51 LEd 2d 642 (1977). See also Lee v United States, 432 US 23, 30, N. 8; 97 SCt 2141; 53 LEd 2d 80 (1977).

Admittedly, a verdict of acquittal, whether based on a jury verdict or a directed verdict entered by the judge, is final even if erroneously entered. Double jeopardy principles bar retrial. Fong Foo v United States, 369 US 141, 143; 82 SCt 671; 7 LEd 2d 629 (1962); United States v Martin Linen Supply Co., 430 US 564, 97 SCt 1349, 51 LEd 2d 642 (1977); Burks v United States, 437 US 1; 98 SCt 2141; 57 LEd 2d 1 (1978); Sanabria v United States, 437 US 54; 98 SCt 2197; 57 LEd 2d 43 (1978).

On the other hand, the important factor to consider under double jeopardy analysis is for defendant to have primary control over the course to be followed where error creeps into the trial. Hence, the double jeopardy clause does not bar retrial where defendant

consents to the interruption of the trial by moving for a mistrial, absent a purposeful act of bad faith on the part of the prosecution or the trial court in order to provoke a mistrial. United States v Dinitz, 454 US 600; 96 SCt 1075; 47 LEd 2d 267 (1976). Similarly, where a defendant seeks to terminate his trial by a dismissal prior to its conclusion, before there has been any factual resolution of his guilt or innocence, retrial is not barred. His motion is "functionally indistinguishable" from a declaration of a mistrial. Defendant has made a deliberate decision to give up his right to have his guilt or innocence determined by the particular jury which has been impanelled. Lee v United States, supra at 31; United States v Scott, supra at 76.

Consequently, the key question here is whether the trial court's use of trial testimony related back to the pretrial motion to quash on legal grounds or extended forward to a directed verdict of acquittal. The former would not be a factual resolution of the defendant's guilt or innocence, the latter would. Petitioner believes that what the trial court was doing was using trial testimony to quash the murder charges - despite the fact that all the elements of the crime had been shown at the preliminary examination - because he believed that the crime of murder had not been shown where some evidence of justification or excuse came out at trial. He was therefore now quashing the information because, in light of this new testimony, he believed the prosecution abused its discretion by overcharging and the examining magistrate abused his discretion by binding defendant over for trial on the murder charge. He used the trial testimony to relate back to the pretrial motion to quash. Thus, the trial court's action was actually a dismissal on a pretrial issue (motion to quash) granted in the middle of trial after jeopardy had attached. The court's decision was a ruling on a question of law: whether the magistrate abused his discretion in finding the evidence sufficient to bind defendant over for trial on first degree murder. And, while he stated he was considering testimony presented at trial, he was not doing so to

resolve the ultimate question of defendant's guilt or innocence - because he then would have continued to hear the remainder of the People's witnesses and entertain the motion for directed verdict he indicated he expected he would have to grant. Retrial is not barred under the standard applied in United States v Scott, supra because the trial ended before there was any resolution of defendant's guilt or innocence. Moreover, defendant herself consented to the termination of her jury trial. She specifically waived her valued right to have her trial completed by a particular jury that had been empaneled to try the case, and chose not to continue with the trial. (Plea T. 4-5, 6-7). This was done over the strenuous objection of the prosecution. Defendant not only had primary control over the proceedings, she had total control to act in her "own best interests" (Plea T. 7), and the prosecution, which had no control over whether the trial would continue but wanted it to proceed, was left to repeatedly object in defendant's presence and on the record that it would appeal (Plea T. 3, 15, 25-26, 28-31).

> "This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had a least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him but because of a legal claim that the government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt. United States v Scott, supra, at 77.
>
> * * * *
>
> "We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a

> basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant. We do not thereby adopt the doctrine of 'waiver' of double jeopardy rejected in [Green v United States, 355 US184, 78 S Ct 221, 2 L Ed 2d 199 (1957).] Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice. In Green the question of defendant's factual guilt or innocence of murder in the first degree was actually submitted to the jury as a trier of fact; in the present case, respondent successfully avoided such a submission of the first count of the indictment by persuading the trial court to dismiss it on a basis which did not depend on guilt or innocence. He was thus neither acquitted nor convicted, because he himself successfully undertook to persuade the trial court not to submit the issue of guilt or innocence to the jury which had been empaneled to try him." (Emphasis added) United States v Scott, supra, at 79.

In summary, defendant deliberately chose to give up her right to have her guilt or innocence decided by this particular jury and consented to the termination of her murder trial when the court granted her pretrial motion to quash in the midst of trial on grounds unrelated to defendant's factual guilt or innocence. Under Dinitz, Scott and Lee, supra, retrial on the charge of first degree murder is not barred by the double jeopardy clause.

CONCLUSION

It is respectfully submitted that the reasons outlined above, the decision of the Michigan Supreme Court is in conflict with and misconceives decisions of this Court, and is in conflict with the Fifth and Fourteenth Amendments of the United States Constitution such that prelenary review should be granted by the Court, and Petitioner's petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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ABW:pd